(4)

Supreme Court, U.S.
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No. 03-1170

In The

Supreme Court of the United States

DONALD SHAFFER,

Petitioner,

V.

AMADA AMERICA
INCORPORATED,

Respondent..

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

All parties are identified in the caption.

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STATUTORY PROVISIONS INVOLVED

Federal Rule of Evidence 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a witness qualified as an expert by knowledge, skill , training, or education, may testify thereto in the form of an opinion or otherwise.

Federal Rule of Evidence 402

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

OSHA standard 29 CFR Subpart "O"

OSHA Regulations (Standards-29 CFR)
General Requirements for all machines -1910.212

(a) (1) Types of guarding .....

(a) (2) General requirements for machine guards.....

(a) (3) Point of operation guarding

(a) (3) (i) Point of operation is the area on a machine where work is actually performed upon the material being processed.

1910.212 (a) (1)

" *Types of guarding. One or more methods of machine guarding shall be provided to protect the operator* ***and other employees*** *in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips, and sparks. Examples of guarding methods are barrier guards, two hand tripping devices, electronic devices etc.*

OSHA Standard 29 CFR 1910.212 (a) (3) (ii)

"*The point of operation of machines whose operation exposes an employee to injury shall be guarded. The guarding devise shall be in conformity with any appropriate standards thereof, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.*"

OSHA standard 29 CFR 1910.147 (a) (iii)
Purpose :

This section requires employers to establish a program and utilize procedures for affixing appropriate lockout devices or tagout devices to energy isolating devices, and to otherwise disable machines or equipment to prevent unexpected energization, start up or release of

stored energy in order to prevent injury to employees.

OSHA Standard 1910.147 App. A Typical minimum lockout procedures:

(4) De-activate the energy isolating device(s) so that the machine or equipment is isolated from the energy source(s).

Other Standards Involved

American National Standards (ANSI) Standard B11.3 at 4. Construction , Reconstruction and Modification provide as follows:

4.1 *Responsibility*

4.1.1 Manufacturer. The manufacturer of new power press brakes, or any enterprise providing power press brakes for a new installation, shall provide power press power press brake in compliance with those provisions of Section 4 **that apply.** (emphasis added)

ANSI Standards B11.3 at 4.2.1, *Hazards to Personnel Associated with MovingParts (***Other than Point of Operation Hazards)** (emphasis added) provides;

The manufacturer of new power press brakes shall eliminate the moving-parts hazard by design, where possible, or provide protection against the hazard in accordance with American National Safety Standard for Mechanical Power Transmission Apparatus, ANSI B15.1-1972, or latest revision thereof approved by ANSI. Where the hazard cannot be eliminated by design or protection the manufacturer shall warn against the hazard.

ANSI 3.45 *Point of Operation.* The area of the tooling or dies where material is actually positioned and work is being performed .

ANSI B11 6.1.4 et seq *Safeguarding the Point of Operation*

ANSI B11.3 4.2.2 Hazards to Personnel Associated with the Point of Operation. Point of operation hazards and the employer's responsibility regarding those hazards are covered in Section 6.

ANSI B11.3 4.2.2 *Hazards to Personnel Associated with the Point of Operation* . Hazards at the point of operation are an entirely different problem from those which can be considered in the construction of the basic machine and its accessory equipment. Thus, point of operation hazards must be considered separately.

ARGUMENT

THE CASES CITED BY DEFENDANT IN ITS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI PROVIDE NO SUPPORT FOR DEFENDANT'S POSITION

Defendant cites Morrison v. Kubota Tractor Company 891 S.W. 2d 422, 426 (Mo. Ct. App. 1994) for the proposition that "a manufacturer is not obliged to adopt only those features which represent the ultimate in safety or design." " holding that the mere availability of a rollover guard did not render a tractor

manufactured without one defective" Brief in Opposition pp. 27, 28.

As was pointed out in Plaintiff's Reply Brief in the 8th Cir.; *Morrison* was decided on a **negligence count.**

Morrison held that the absence of a Roll Over Protection System on a tractor was an open and obvious danger that was apparent to the decedent who had 40 years experience with tractors. An obvious danger **was not actionable under the negligence law of Missouri.** (emphasis added) Morrison at 427, 428 The jury returned a verdict finding Morrison 100% at fault in the strict product liability count. *Morrison at 425*

Morrison v. Kubota Tractor 891 S.W. 2d 422, (M0 Ct. of App. 1994) at 428. Note 5 specifically declined to decide whether the open and obvious nature of the peril posed by the absence of a safety device such as a Roll Over Protection System on a given product may justify a directed verdict in a products liability case after Missouri's adoption (by statue) of comparative fault in such cases.

In *Oglesby v. General Motors Corporation 190 F. 3d 244 (4th Cir. 1999)* the plaintiff was leaning into the engine compartment of a seven -year old Chevrolet Silverado pickup truck to adjust a transmission cable, a radiator hose detached, causing Oglesby serious burn injuries. Oglesby filed a products liability action against General Motors, claiming that his injuries were caused by a defective plastic hose connector between the radiator and the radiator hose. Oglesby tendered Douglas Bradbury, a former professor of mechanical engineering at Clemson University, as an expert witness. He had no

particularized experience or expertise in evaluating either automobile manufacturing processes or the strength of plastic automobile component parts. In preparing to render his expert opinion Bradbury looked at the broken plastic connector and the piece that broke off, took physical measurements of the connector, and photographed the parts He found that the connector was not circular but was a flattened oval in shape. noting that "the difference in the "major" and minor dimensions was 1/10 inch. " From his observation and measurement Bradbury concluded:

> "The out-of-roundness of the upper (inlet) hose connector was apparently a manufacturing defect. Certainly there would be no reason to design it as an oval shape, considering the method of clamping. Two probable causes of the out-of-roundness are recognized. One is that the upper connector was manufactured out-of-round. This is most unlikely. It is most likely that a defect in the formulation or handling of the thermo-setting plastic caused time -dependent internal stresses which deformed the connector form round to oval, ultimately resulting in the loosening of the upper hose and the scalding of James Oglesby. After Bradbury gave his opinion a General Motors expert testified that the part was " not a thermo-setting plastic," but a "nylon composite, glass filled " that had "thermoplastic " characteristics including the "ability to be remolten." Bradbury submitted an affidavit stating that he incorrectly identified the material in question, but his opinion was unchanged.

The Court found that Bradbury assumed that the part could only have gotten out of round due to mishandling of the part during the manufacturing process. He could not eliminate other possibilities, including, engine overheating, trauma to the inlet connector if the radiator when removed from the car had tipped over, or stress applied by leaning on the connector with too much weight when the plastic was hot, all of which would be consistent with the history of the part. Bradbury had no factual basis to make the assumption that the part could only have gotten out-of -round before it left the manufacturers control.

The Court found that Bradbury's opinion depended on the premise of the inability of the part to change shape once it was "set." Bradury did not alter his opinion at all when confronted with the error in his underlying assumption as to the composition of the part. *Oglesby V. General Motors Cooperation 190 F. 3d 244 (4th Cir. 1999)*

In Ancho v .Pentek Corp. 157 F. 3d 512 (7th Cir. 1988) the proffered expert had no experience with the matters in question. Additionally **he failed to even visit the accident site or view the conveyor or any similar conveyor system in operation.** (emphasis added) In *Ancho*

The entire plant would have to be reconfigured if the transfer car were eliminated. All traffic would have to be rerouted around the conveyor, or moved elsewhere. The Appellate Court expressed great doubt that he had any way of knowing whether it would be feasible to eliminate the transfer car. *Ancho V. Pentek Corporation 157 F. 3d 512 513, 514, 517, 518 (7th Cir. 1998)*

Chapman V. Maytag Corporation 297 F. 3d 682 (7th Cir. 2002) involved an electrocution of a homeowner who had plugged an electric stove into a

non grounded electrical outlet. The proffered expert, a mechanical engineer, opined that an electrical circuit breaker failed to trip due to a "restrictive short" rather than a direct short. The Court held that the proffered expert, Petry, was not qualified to render an opinion on electrical matters as he was a mechanical engineer with no particular training or experience in the field. The Court further held that Petry's testimony did not satisfy any of the Daubert factors. *Chapman V. Maytag Corporation 297 F. 3d 682, 688 (7th Cir. 2001)*

In *Tokio Marine & Fire Insurance Co. V. Grove Manufacturing Co. 958 F. 2d 1169 (1st Cir.. 1992)* the excluded "expert" was found by the trial court to be a "hired gun" with a background as an "instant expert in an astonishing number of areas" which "suggested he would not possess the professional safeguards ensuring objectivity." 762 F Supp. at 1017. Supp. at 1017, 958 F. 2d 1169 , 1174.

He admitted that he had never examined the crane involved in the accident in the case, or spoken with its operator. He had bachelor's degree in **civil engineering. He conceded that he was not an expert on load moment indicators.** He was prepared to testify that the absence of a load moment indicator would have prevented the crane from overturning.

Defendant cites *Diviero V. Uniroyal Goodrich Tire Co. 919 F. Supp. 1353, 1357, aff'd at 114 F. 2d 951 (9th Cir. 1997* for the proposition that courts have excluded the testimony of engineers because their expertise was not particular to the science involved in the case. In *Diviero,* the proffered expert sought to testify regarding an alleged design or manufacturing adhesion defect in a steel belted tire. The engineer had no prior experience with steel belted tires, only with bias belted tires. He stated that the two

types of tires differed significantly. He had, by his own admission, no knowledge of the complex chemical, mechanical, or thermal components that go into the process of the steel to rubber interface on a steel belted tire. He stated simply "When I have a tire that has separated, I have breakdown in the adhesion, there's no question about that." 991 F Supp. 1353, 1356, 57.

In *J.B. Hunt Trans, Inc. V. General Motors 243 F. 3d 441(8th Cir. 2001)* claimed to be an expert in "foamology." As far as the District Court was unable to determine there is no science of foam. The Court stated: "He has no idea what happens to foam under normal circumstances, so how can he have any scientific basis for basing any of his conclusions on what happened to the foam in this case ?" 243 F. 3d 441, 444.

In *McLaghlin v. Esselte Pendaflex Corp. 50 F. 3d 507, (8th Cir. 1995)* the plaintiff brought a discrimination action against her former employer. The Court held that the uncontroverted evidence was that the new position had differing duties that the employee failed to demonstrate she was able to perform.

Crump v. MacNaughton 743 S.W. 2d 532(Mo. Ct. App. 1987) reversed a directed verdict for the defendant in a product liability case. The plaintiff's evidence was strictly circumstantial. The Court stated: "A case based in strict liability does not require an impossible standard of proof. The proof need only be realistically tailored to the circumstances.

This Court's Rulings in Daubert and Kuhmo Tire do not require the impossible standard of proof imposed on the plaintiff by the District Court in the instant case. The Decisions of the District and Appellate Courts in the instant case so far depart from

the accepted and usual course of judicial proceedings as to call for this Court to exercise its supervisory power. Neither the defendant or either of the Courts have been able to cite even one case which remotely supports the aberrant decisions rendered below. The undersigned has scanned or read in full literally hundreds of the decisions which cite Daubert. The undersigned has found no case in which the facts are even remotely close in which an expert witness was barred or summary judgment entered.

If allowed to stand, the erroneous decision of the 8th Circuit will send a clear message that Courts need not conform to the dictates of this Court as set forth in *Daubert and Kuhmo Tire.* Federal Courts will be free to impose individualized standards requiring a plaintiff to prove his or her case beyond any question of scientific or engineering certainty **to survive a Motion for Summary Judgment.** Only experts who have a vested interest in defending the alleged dangerous product will be allowed to testify. **Under the decision above no plaintiff will ever be able to overcome a Motion for Summary Judgment in a products liability case in the 8th Circuit. Justice will be left to the whim of the District Court .**

This Honorable Court is the final arbiter of Justice. For the reasons and authorities cited Petitioner prays this Honorable Court to Grant the Petition for Writ of Certiorari in the above entitled cause.

Respectfully Submitted,
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MOTION FILED
MAR 30 2004

(3)

No. 03-1170

In The

Supreme Court of the United States

DONALD SHAFFER,

Petitioner,

V.

AMADA AMERICA INCORPORATED,

Respondent..

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Motion for Sanctions for Making a False Statement to The Court; and for Leave to Supplement the Record

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QUESTIONS PRESENTED FOR REVIEW

Whether in a product liability case a Ph.D. mechanical engineer with over twenty years experience as a professor and researcher in the fields of machine design and safety, who has programmed press brakes to operate by computer numerical control must have actually designed a safety device(s) commonly used in the industry, which is recognized and required by OSHA regulations and American National Standards Institute Standards; and marketed by nearly every manufacturer of power press brakes, in order to be considered qualified to render an opinion as to the feasibility of installing such a devise(s) on the power operated press brake at issue.

Whether recognition by the American National Standards Institute, and The Occupational Health and Safety Administration, production and sale by virtually every manufacturer of power press brakes, testimony by defendant's employees of common usage of a safety device on press brakes sold by the defendant, and identification by the defendant's retained expert of safety devices recommended by the plaintiff's expert as methods of guarding that could be used on the press brake at issue, in a product liability /design defect case constitutes "general acceptance " pursuant to this Court's rulings in *Dauber v. Merrell Dow Pharmaceuticals, Inc,. 509 U.S. 579, 113 S. Ct.. 2786, (1993) and Kuhmo Tire Ltd. v. Carmichael 526 U.S. 137, 119 S. Ct. 1167 (1999)*

Whether in the absence of expert design testimony the testimony of plaintiff's safety expert, Mandara Savage, Ph.D., stating that due to the fact that the maintenance operation plaintiff was performing at the time of his injury had to be performed while the press brake was energized, in violation of Occupational Safety and Health Administration (OSHA) Standard 1910.147 (a) 147.10, caused an unreasonably dangerous condition to exist with regard to a normal maintenance procedure, coupled with evidence of

OSHA regulations and American National Standards Institute (ANSI) standards, which recognize and require forms of machine guarding as identified by plaintiff's expert design witness, along with the testimony of defendant's employees and retained expert design witness raise sufficient factual questions to allow a jury to find that the machine in question was unreasonably dangerous to preclude the entry of summary judgment for defendant .

LIST OF PARTIES

All parties are identified in the caption.

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CITATIONS OF OPINIONS AND ORDERS

ENTERED

United States District Court for the Eastern District of Missouri No. 4:02CV1767CDP

United States Court of Appeals for the Eighth Circuit

No.03-1388 UNPUBLISHED

JURISDICTIONAL STATEMENT

(a) This Court's jurisdiction is invoked pursuant to United States Supreme Court Rule 10 (a) United States Court of Appeals has entered a decision which conflicts with the decisions of more than one other United States Court of Appeals on the same important matter.

A United States Court of Appeals has sanctioned a decision by a lower court which so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

(b) The decision of the United States Court of Appeals for the Eighth Circuit was entered September 18, 2003.

(c) A timely Petition for Rehearing with Petition for Rehearing En Banc was filed on October 02, 2003

(d) An Answer to the Petition was requested on 10/14// 03

(e) the Petition for Rehearing with Petition for Rehearing En Banc was denied on November 12, 2003

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(f) The District Court had jurisdiction pursuant to 28 United States Code 1332 (1) . Plaintiff, Donald Shaffer was a citizen of the State of Illinois when the case was filled. Plaintiff is currently a resident of the State of Texas. The Defendant is a corporation organized under the laws of the State of Washington.

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a witness qualified as an expert by knowledge, skill , training, or education, may testify thereto in the form of an opinion or otherwise.

Federal Rule of Civil Procedure 402

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

OSHA standard 29 CFR Subpart "O"

1910.212 (a) (1)

" *Types of guarding. One or more methods of machine guarding shall be provided to protect the operator* ***and other employees*** *in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips, and sparks. Examples of guarding methods*

OSHA Standard 29 CFR 1910.212 (a) (3) (ii)

"*The point of operation of machines whose operation exposes an employee to injury shall be guarded. The guarding devise shall be in conformity with any appropriate standards thereof, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle."*

OSHA standard 29 CFR 1910.147 (a) (iii)

Purpose :

> This section requires employers to establish a program and utilize procedures for affixing appropriate lockout devices or tagout devices to energy isolating devices, and to otherwise disable machines or equipment to prevent unexpected energization, start up or release of stored energy in order to prevent injury to employees.

OSHA Standard 1910.147 App. A

Typical minimum lockout procedures:

> (4) De-activate the energy isolating device(s) so that the machine or equipment is isolated from the energy source(s).